

**4 YEARLY REVIEW OF MODERN AWARDS
AWARD STAGE – HORTICULTURE AWARD 2010
MATTER NO. AM2014/217**

SUBMISSION

NATIONAL FARMERS' FEDERATION

Date: 18 December 2017

Introduction

1. On 08 December 2017, the Fair Work Commission (**Commission**) directed that any interested party wishing to file submissions in reply to the submissions filed on 7 December 2017 by the NUW and AWU must do so by close of business on Monday, 18 December 2017.
2. These submissions responds to that direction.

Proposed Clause

3. On 16 November 2017 the Commission decided (**the Substantive Decision**) that the *Horticulture Award 2010* (**the Horticulture Award**) should cover “agricultural production within the ‘farm gate’”.¹ Furthermore, the Full Bench found that:

[50] The ‘farm gate’ is not a reference to a physical barrier or gate that hangs from a fence on a particular farm. Rather the evidence in these proceedings demonstrated that the ‘farm gate’ is a well-known concept in the horticulture industry which refers to the activities which are carried out by the producer up to the first point of sale from the producer to its customer/s. That is, the ‘farm gate’ concept is not determined by the location of work.

[51] The producing of horticultural crops involves a number of integrated and interconnected processes that often take place across numerous physical locations, to ensure the most efficient use of resources, and to meet production needs and customer requirements.

[52] These include activities at the beginning of the process (such as sowing, planting and raising), in the middle of the process (such as harvesting and picking) and at the

¹ [69]

end of the process (such as washing, grading, packing and despatching) before the crops are transported to market.

[53] The fact that activities such as washing, grading, packing and despatching may be undertaken at different premises to where the crops are grown and harvested does not mean that these activities are 'beyond the farm gate'.

[54] It has been held that 'cleaning, sorting and bagging' are 'the last stages of harvesting'. We agree with this characterisation.

4. For those reasons, the Full Bench provisionally determined to vary the Horticulture Award as follows:

1. *Inserting a new definition of enterprise in subclause 3.1. as follows:*

'Enterprise means a business, activity, project or undertaking, and includes:

- An employer that is engaged with others in a joint venture or common enterprise; or*
- Employers that are related bodies corporate within the meaning of s.50 of the Corporations Act 2001 (Cth) or associated entities within the meaning of s.50AAA of the Corporations Act 2001 (Cth).'*

2. *Inserting a new definition of 'horticultural enterprise' in subclause 3.1 as follows:*

'Horticultural enterprise means an enterprise which as an important part of its enterprise engages in the raising of horticultural crops.'

3. *Deleting subclause 4.2 and inserting a new subclause 4.2 as follows:*

'4.2 Horticulture industry means:

(a) the sowing, planting, raising, cultivation, harvesting, picking, washing, packing, storing, grading, forwarding or treating of horticultural crops in connection with a horticultural enterprise; or

(b) clearing, fencing, trenching, draining or otherwise preparing or treating land or property in connection with the activities listed at 4.2(a).'

NUW's Submission

5. In its submission dated 7 December 2017 the NUW claims that the effect of the proposed variation would exceed the intent of the Full Bench because it may extend the operation of the Horticulture Award beyond the 'first point of sale' and into workplaces traditionally covered by the *Storage Services Award 2010 (SS Award)* if those workplaces had a "connection with a horticultural enterprise."
6. In the NFF's view this submission has no basis.
- a. The NUW correctly identifies that coverage will apply to packing, etc, activities, which are conducted "in connection with" a horticulture enterprise.

- b. However, the expression “in connection with” will not result in the award applying to any workplace with an association with the business of growing crops.
 - c. The meaning, and consequentially the effect, of the expression “in connection with” is derived from its context. In this case, it is clear from the context that the crops which will be washed, packed, stored, graded, forwarded, etcetera, are those which will be raised by the entity concerned, by a related entity, or in the course of a “common enterprise”².
 - d. It follows that workplaces which are wholly distinct from the raising of the crops and ought properly be covered by the SS Award would not be covered by the Horticulture Award as varied.
7. The NUW’s proposal to deal with this supposed problem is to insert a new ‘carve-out’ to the definition of *Horticulture Industry* at new subclause (f). In the NFF’s submission, this proposed new subclause (f) is unnecessary and would only add complexity to the question of coverage without otherwise accomplishing anything of substance.
8. The NUW also claims that:
- a. Some expressions used in the proposed clause — “important part” and “common enterprise”³ — are vague;
 - b. Others expressions — “related bodies corporate” and “associated entities” — require complex analysis which is beyond the capabilities of workers, the regulator, and others.
9. The NFF notes that these concerns about the proposed clause were covered at the substantive hearing of the application in the oral submissions which Mr. Bakri made on 04 August 2017.⁴ As such, it may be concluded that the Commission has already considered and did not find them persuasive.

² Contrary to the NUW’s submission, the term “common enterprise” is not vague; it has a well understood meaning within the regime established by the *Fair Work Act 2009*: see, for example, ss. 168A and 172.

³ See observation at footnote [2].

⁴ PN1778 to PN1805

10. In any event, the NUW's concerns could be raised in respect of many aspects of almost any modern award (or, indeed, any instrument with legal operation). Indeed, they are internally inconstant: criticizing some expressions in the proposed variation for being imprecise and others for being too precise.
11. They appear to be mere arguments of convenience and, in the NFF's submission, should not be accepted by the Commission.

AWU's Submissions

12. The AWU's first submission is that, as varied, the Horticulture Award may apply to packing facilities in "metropolitan areas" and that:
Large packing facilities located in metropolitan areas are not part of the agricultural industry and employees working at these facilities should not have the same minimum conditions of employment as employees working on a farm.
13. This submission is not supported by evidence and, in the NFF's view, is misconceived. It may be true that (for any number of reasons⁵) the agricultural industry is typically associated with rural and regional areas. However, it is a fallacy to say that farming can only occur on rural/regional land, or that the location is decisive to establishing whether an enterprise is part of the horticulture (or agricultural) industry. Indeed as the Commission observed: "the 'farm gate' concept is not determined by the location of work."⁶
14. At paragraph [20] of its submissions the AWU identifies a packing facility which it claims is not a part of the horticultural sector. However, the AWU gives no reason for reaching this conclusion other than the fact of its location. Indeed, it logically follows that if the facility was located at (say) Yeppoon, in rural Queensland, then the AWU would not cite it as an example of the Horticulture Award's potential for overreach.
15. In short, it is a mistake to say that farming may only occur on rural/regional land or that it is conceptually impossible for a "farm gate" to exist in metropolitan area. Indeed, there may be value in growers having a centralized packing shed located in a

⁵ Potentially including population density and land use management strategies

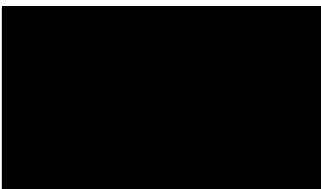
⁶ At paragraph [50] of the Substantive Decision

metropolitan area, close to market; those forward thinking growers should not be disadvantaged.

16. It may also be noted that the AWU seeks to confine the operation of the Horticulture Award to off-site facilities “in close proximity” to farms etc. The AWU argument seems to be that this notion of “close proximity” to a farm was central to the Full Bench’s reasoning in the substantive decision.
17. The Full Bench does occasionally note the location of packing sheds in proximity to farms to illustrate the absurd outcomes which may result from the Award’s present coverage provisions. However, it was just that: an illustration. It was not a part of the Full Bench’s rationale for varying the award or a factor which is consistent with the Substantive Determination. The notion of “close proximity” would be an artificial limitation and, in the NFF’s submission, should not be rejected by the Commission.
18. Finally, the AWU cites the use of terms which are defined in legislation as a reason for rejecting the proposed draft. The NFF refers to the submission it makes above at paragraph [8] to [11].

NFF Position

19. The NFF confirms the position it expressed at the substantive hearing of this matter in support of the proposed variation.



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